

No. 16389 ✓

United States
Court of Appeals
for the Ninth Circuit

THE STATE OF NEVADA, Ex Rel Hugh A.
Shamberger, State Engineer,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Supplemental
Transcript of Record

Appeal from the United States District Court
for the District of Nevada

FILED

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PAUL P. O'BRIEN, CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States
for the District of Nevada

No. 1247

THE STATE OF NEVADA, Ex Rel HUGH A.
SHAMBERGER, State Engineer,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

PETITION FOR REMOVAL

To the Honorable Judge of the District Court
of the United States for the District of Nevada:

Comes now the Attorney General of the United
States of America, acting by and through J. Lee
Rankin, Assistant Attorney General, and William
H. Veeder, Attorney, Department of Justice, and
respectfully alleges:

I.

There was served on the United States of
America on December 7, 1955, a pleading designated
Complaint for Declaratory Judgment filed by the
State of Nevada in the Fifth Judicial District
Court of the State of Nevada, in and for the County
of Mineral.

II.

The State of Nevada by its complaint seeks a
declaratory judgment "for the purpose of securing
the judicial determination of its rights, status and

legal relations under its laws pertaining to the appropriation to beneficial use of the underground waters of said state by the United States and its government * * *.”¹

III.

It is alleged in the complaint that the United States of America prior to 1935² established the United States Naval Ammunition Depot, near the town of Hawthorne, Mineral County, State of Nevada; that a portion of the land was ceded to the United States of America by the Treaty of Gauadalupe Hidalgo in 1848 except those parcels that passed into private ownership; upon the admision of Nevada into the Union in 1864, it is alleged that “the United States neither by Act of Congress or by stipulation then, nor by any applicable Act of Congress thereafter, reserved any jurisdiction ousting the jurisdiction of the applicable laws of the state pertaining to ownership and the use of the waters thereof including the area comprising said depot.”³

IV.

It is further alleged in Nevada’s complaint that its Legislature ceded to the Federal Government jurisdiction over the lands comprising the United States Naval Ammunition Depot here involved “but not over the corpus of the water nor the application

¹Complaint for Declaratory Judgment, page 1.

²Complaint for Declaratory Judgment, par. I, page 1.

³Complaint for Declaratory Judgment, par. I, pages 1, 2.

of its laws providing for the beneficial use thereof, reserving in Section 3 thereof the right to serve any of its criminal or civil process within the area for any cause there or elsewhere in the state arising, where such cause comes properly under the jurisdiction of the state laws.”⁴

V.

Reviewed at length in the Complaint for Declaratory Judgment is the “Act Relating to Underground Waters, the same being Chapter 178, Statutes of Nevada, 1939”;⁵ it is then averred that the law last mentioned is in full force and effect and that “‘The water of all sources of water supply within the boundaries of the state, whether above or beneath the surface of the ground belongs to the public.’”⁶ Reference is then made to the requirement that application must be made to the State Engineer for a permit to appropriate the waters within the state for a beneficial use.⁷

VI.

It is then alleged by Nevada that on or about the 15th day of February, 1942, and at various

⁴Complaint for Declaratory Judgment, par. II, page 2.

⁵Complaint for Declaratory Judgment, par. III (a), (b), (c), (d), pages 2, 3, 4.

⁶Complaint for Declaratory Judgment, par. IV, page 4.

⁷Complaint for Declaratory Judgment, par. IV (a), (b) 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, pages 4, 5, 6, 7, 8.

times thereafter up to and including the 15th day of September, 1945, the United States of America, being represented by the Commanding Officer of the United States Naval Ammunition Depot, referred to above, allegedly caused to be drilled certain wells; that the water from those wells was for the "beneficial consumptive use" of the Ammunition Depot; that subsequent to the completion of the wells, in the year 1949, filings were made with the State Engineer's Office for permits to appropriate the waters from the wells and that permits were issued pursuant to those filings.⁸

VII.

It is averred that extensions of time granted by the State Engineer to make proof of application of water to beneficial use expired on the 27th day of July, 1955;⁹ that notice was given to Captain W. S. Mayer, Commanding Officer of the above-mentioned Depot, that unless filings respecting application of water to a beneficial use were made within thirty days, the application would be cancelled; that on the 25th day of July, 1955, the above-mentioned Captain W. S. Mayer notified the State Engineer that the applications for water rights with regard to the wells in question were being dropped "upon instructions of the Commandant of

⁸Complaint for Declaratory Judgment, pars. V, VI (a), (b), (c), (d), pages 8, 9, 10, 11.

⁹Complaint for Declaratory Judgment, par. VII (a), page 11.

the Twelfth Naval District based upon an alleged rule of the United States Supreme Court in the case of Federal Power Commision vs. The State of Oregon, 349 U. S. 435.¹⁰ It is likewise averred that on the 7th day of September, 1955, the State Engineer made, entered and served upon Captain Mayer an order entitled "In The Matter of Permits To Appropriate Water, Serial Numbers 12988 to 12993, Inclusive, In The Name of U. S. of America, U. S. Naval Ammunition Depot, Hawthorne, Nevada," ordering that by reason of the failure of the applicant to file proofs of beneficial use and the failure to make application for extension of time within which to file the proofs according to law, the permits were cancelled as of the 25th day of August, 1955.¹¹ Thereafter it is averred that "the applicant was granted until thirty days from and after the said 7th day of September, 1955, in which to reinstate said permits, a full, true and correct copy of which said Order marked Exhibit E is hereunto annexed, made a part hereof and referred to as if here fully set forth; that neither the United States Government nor any officer or representative thereof in its behalf have reinstated or endeavored to reinstate said permits, but have failed, neglected and refused so to do, and that any use of said waters is now illegal and contrary to the

¹⁰Complaint for Declaratory Judgment, par. VII (a), page 11.

¹¹Complaint for Declaratory Judgment, par. VII (b), pages 11, 12.

laws of the State of Nevada in such cases made and provided.”¹²

VIII.

Jurisdiction of the Fifth Judicial District Court of the State of Nevada is averred to be predicated upon Section 6, Article VI, of the Constitution of Nevada; similarly it is averred that the court last mentioned is “endowed with the power to declare rights, status and legal relations” pursuant to “Section 1 of ‘An Act providing for declaratory judgments,’ approved March 4, 1929, being Section 9440, Nevada Compiled Laws 1929”; that the United States of America “has consented to be sued in any suit with respect to the rights to the use of water of a river system or other sources, or the administration of such rights, in that certain Act of Congress, approved July 10, 1952, being found in 66 U. S. Statutes 560, Title 2, and also in Title 43, Section 666 * * *. ”¹³

IX.

Nevada then “prays judgment declaring its rights, status and legal relations in and to the underground waters situate in the said United States Naval Ammunition Depot:” (1) That the waters “were and are the property of and belong to the State of Nevada”; (2) That the Legislature

¹²Complaint for Declaratory Judgment, par. VII (b), page 12.

¹³Complaint for Declaratory Judgment, par. VIII, 1, 2, 3, 4, pages 12, 13.

of the State of Nevada is the only department endowed with constitutional power to dispose of and relinquish title to the property; (3) That the State of Nevada did not cede exclusive jurisdiction over the underground waters situated in the Naval Depot; (4) "That by reason of the failure, neglect and refusal of the officers and representatives of the United States and its government to file its proofs of application of said underground waters to beneficial use as required by the water laws of the State and the resultant cancellation of its permits to appropriate said waters pursuant to such laws, the use of said waters by the United States and its naval department is an illegal use and contrary to the laws of the State";¹⁴ that "the Court in this declaratory judgment enter such other orders as shall be deemed meet."¹⁵

X.

The United States of America, Defendant, derives all of its powers in connection with the Administration of the United States Naval Ammunition Depot alluded to above from the Constitution of the United States; the action is founded on claims and rights arising under the Constitution, treaties and laws of the United States of America, over which the United States District Court for the District of Nevada has original jurisdiction.

¹⁴Complaint for Declaratory Judgment, pages 13, 14.

¹⁵Complaint for Declaratory Judgment, page 14.

XI.

Service of a copy of the summons and Complaint for Declaratory Judgment in the subject cause was made upon the United States of America pursuant to 43 U. S. C., 666 by the delivery of it to John V. Lindsay, Executive Assistant to the Attorney General of the United States, who is empowered to receive service on behalf of the Attorney General pursuant to 43 U. S. C., 666.

XII.

Copies of all of the summons, pleadings, exhibits, orders and related documents served upon the United States of America are hereto attached.

XIII.

This petition for removal is pursuant to the provisions of 28 U. S. C., 1441, et seq.; 28 U. S. C., 1446, et seq.

Wherefore the United States of America, Defendant, prays that the aforesaid and above-entitled action for declaratory judgment, No. 2885, in the Fifth Judicial District Court of the State of Nevada, in and for the County of Mineral, be removed to the District Court of the United States for the District of Nevada for trial and determination and for such other proceedings as may be necessary so that the ends of justice will be served and that this Honorable Court proceed thereupon as if the cause had been originally commenced herein.

Dated: December 22, 1955.

UNITED STATES OF
AMERICA,

/s/ J. LEE RANKIN,
Assistant Attorney General;

/s/ WILLIAM H. VEEDER,
Attorney, Department of
Justice.

Duly Verified.

[Endorsed]: Filed December 27, 1955.

[Title of District Court and Cause.]

MOTION TO REMAND

Comes Now the plaintiff State of Nevada, and moves the Court to remand this cause to the Fifth Judicial District Court of the State of Nevada, in and for the County of Mineral, from which Court it was attempted to be removed to this Court, upon and for the following reasons and grounds, to wit:

That neither the complaint of plaintiff nor the petition for removal states facts sufficient to constitute any Federal question vesting original or any jurisdiction in the said United States District Court.

/s/ HARVEY DICKERSON,
Attorney General of Nevada;

/s/ W. T. MATHEWS,
Special Assistant Attorney General, Nevada; Attorneys for Plaintiff.

[Endorsed]: Filed January 9, 1956.

[Title of District Court and Cause.]

**MOTION FOR SUMMARY JUDGMENT AND
MOTION TO DISMISS**

Comes now the United States of America, acting by and through J. Lee Rankin, Assistant Attorney General, and William H. Veeder, Attorney, Department of Justice, and respectfully moves this Court:

1. To dismiss this action because the Complaint for Declaratory Judgment filed by the State of Nevada fails to state a claim against the United States of America upon which relief can be granted, but rather that complaint reveals on the face of it that the United States of America is the owner of and has title to the rights to the use of water which are part and parcel of the lands comprising the United States Naval Ammunition Depot near the town of Hawthorne, Mineral County, State of Nevada, the rights in question being exercised for the purpose of National Defense.¹

¹See Affidavit, Exhibit E, respecting title to the lands involved, and Exhibits A, B, C and D, Executive Orders withdrawing the lands for the purpose of establishing the ammunition depot in question.

2. To dismiss this action for the reason that this Honorable Court lacks jurisdiction over the United States of America which has neither consented to be sued nor in any manner waived its immunity from suits of the character here involved under the facts and circumstances alleged in the complaint originally filed in the Fifth Judicial District Court of the State of Nevada, in and for the County of Mineral and removed to this Court.

Wherefore the United States of America, based upon the supporting affidavit and exhibits, together with the accompanying memorandum of points and authorities in support of these motions, does respectfully petition this Honorable Court to enter a judgment of dismissal on the grounds and for the reasons that the complaint fails to state a claim because of the ownership of the properties here involved by the United States of America and that Nevada is without any right, title, interest or control over those properties described in the complaint, or to dismiss this cause by reason of the lack of this Court's jurisdiction over the United States of America or its properties.

Dated: December 30, 1955.

UNITED STATES OF
AMERICA,

/s/ J. LEE RANKIN,
Assistant Attorney General;

/s/ WILLIAM H. VEEDER,
Attorney, Department of
Justice.

[Endorsed]: Filed January 3, 1956.

[Title of District Court and Cause.]

ORDER DENYING MOTION TO REMAND

The motion of the plaintiff to remand the above-entitled matter back to the Fifth Judicial District Court of the State of Nevada, in and for the County of Mineral, came on this day to be heard, the Attorney General of the State of Nevada being represented by W. T. Mathews and William J. Kane, Special Assistant Attorney General, and William D. Dunseath, Deputy Attorney General, the United States being represented by Stanley H. Brown, Assistant United States Attorney, and David R. Warner, Attorney Department of Justice; and the motion being argued and submitted to the Court for ruling, and being fully considered by the Court; now, therefore, and good cause appearing, it is

Ordered, that the plaintiff's motion to remand be and the same is hereby denied.

Dated at Carson City, Nevada, this 24th day of May, 1956.

/s/ JOHN R. ROSS,
United States District Judge.

[Endorsed]: Filed June 5, 1956.

[Title of District Court and Cause.]

ORDER DENYING MOTION TO DISMISS
ACTION AND FOR SUMMARY JUDG-
MENT

The motions of the United States, defendant above, to dismiss the action filed by the State of Nevada, and for a summary judgment, came on this day for hearing, W. T. Mathews and William J. Kane, Special Assistant Attorneys General, appearing for the State of Nevada, the United States being represented by Stanley H. Brown, Assistant United States Attorney, and David R. Warner, Attorney Department of Justice; and each of said motions being argued and submitted to the Court for ruling, and being fully considered by the Court; now, therefore, and good cause appearing, it is

Ordered, that defendant's motion to dismiss the action be and the same is hereby denied; and it is

Further Ordered, that defendant's motion for a summary judgment be and the same is hereby denied; and it is

Further Ordered, that the defendant shall have thirty (30) days in which to answer.

Dated at Carson City, Nevada, this 25th day of May, 1956.

/s/ JOHN R. ROSS,

United States District Judge.

[Endorsed]: Filed June 5, 1956.

[Endorsed]: No. 16389. United States Court of Appeals for the Ninth Circuit. The State of Nevada, Ex Rel Hugh A. Shamberger, State Engineer, Appellant, vs. United States of America, Appellee. Supplemental Transcript of Record. Appeal from the United States District Court for the District of Nevada.

Filed and Docketed: March 3, 1959.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.